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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARY ELSSMANN et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA PREPARATORY COLLEGE, INC. et al.,

Defendants and Respondents.

E060395

(Super.Ct.No. CIVDS1104266)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn and Donna G. Garza, Judges.[1] Affirmed.

Law Offices of Brian C. Ostler, Sr., Brian C. Ostler, Sr., and Matthew J. Rumishek for Plaintiffs and Appellants.

The Quinlan Law Firm, Kate E. Frenzinger; Law Office of Joel D. Peterson, Joel D. Peterson; Ziprick & Cramer and Robert Ziprick, for Defendants and Respondents.

[1] Judge Garza presided over the discovery motions, while Judge Cohn presided over the trial.

Defendants and respondents Larry R. Polhill (Polhill), Glenn Elssmann[2] (Glenn), and Gene Edelbach (Edelbach), started a private, faith-based junior college, California Preparatory College, Inc. (CPC) in 2007. They funded the college's startup costs via investments and loans, including loans from plaintiffs and appellants Mary Elssmann (Mary) and Stanley Elssmann (Stanley). The individual defendants also invested their own money into the college. When plaintiffs' loans were not paid back by their respective due dates, plaintiffs initiated this action for breach of contract, common counts for money had and received or lent, fraud, negligent misrepresentation, and elder abuse. Defendants never denied CPC's liability for the loans.

Following the close of plaintiffs' case, the trial court granted nonsuit on Mary's tort claims as to all defendants and granted nonsuit on all claims as to the individual defendants. Judgment was entered in favor of Mary (in the sum of $153,919.39 plus costs) and Stanley (in the sum of $28,062.53 plus costs) and against CPC. Plaintiffs appeal, challenging the trial court's grant of nonsuit, along with several pretrial orders concerning discovery motions, leave to file an amended answer, and the exclusion of evidence. We affirm the judgment.

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[2] For ease of reference and with no disrespect intended, we will refer to any party named Elssmann by his or her first name.

I. FACTS AND PROCEDURAL BACKGROUND[3]

On March 25, 2011, plaintiffs initiated this action against defendants. By way of their amended complaint filed on June 22, 2011, Mary alleged breach of contract (first cause of action) and common counts for money had and received or lent (third and fourth causes of action) as to CPC; and fraud (ninth cause of action), negligent misrepresentation (tenth cause of action) and elder abuse (eleventh cause of action) as to all defendants; while Stanley alleged breach of contract (second cause of action) as to CPC, and common counts for money had and received or lent (fifth through eighth, inclusive, causes of action) as to CPC and Glenn. A jury trial commenced, and plaintiffs' case-in-chief produced the following evidence:

In 2007 Glenn and Edelbach founded CPC to address concerns about the increasing cost of education of college students and to provide an option for cost-efficient, faith-based, general education coursework. CPC is a for-profit entity. Initially it operated the college and raised money. However, it sold the operations to a nonprofit entity, California Preparatory College Education Group, Inc. (Cal Prep), "to cover expenses and investment money and loans and all the things that have been put into it at this time . . . ." Cal Prep gave CPC a note for seven million dollars.[4] The college sought

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[3] On November 17, 2014, plaintiffs filed an appendix of materials referred to in brief, which we deemed a request for judicial notice to be considered with the appeal. We deny the request.

[4] It appears that the parties interchangeably use the term CPC and Cal Prep when referring to the college. CPC is the entity that received the monies from plaintiffs, as well as the entity that was sued.

accreditation in order to attract students and qualify to receive federal grants and loans for those students. Prior to receiving accreditation, Cal Prep covered the students' tuitions, i.e., whatever grants they would have received. Defendants believed that by the college's third year of operation, the need to borrow money would be significantly reduced. Edelbach and Glenn serve on CPC's and Cal Prep's boards of directors. Polhill served on CPC's board of directors until May 14, 2009. He is a shareholder, director and president of American Pacific Financial Corporation (APFC), a company that invested in various business ventures, including CPC. Glenn and Polhill were business acquaintances; however, they had never had business dealings together.

Glenn, Edelbach and Polhill founded an entity called "CARR" that owns CPC. They also raised money for CPC. APFC provided financing to CPC, which was secured via APFC's filing of a UCC financing statement. Glenn spoke with his mother, Mary (born in 1930), about the college, and asked if she could help fund the school by making a loan through APFC. Initially, Mary said she could not assist; however, she later changed her mind because Glenn told her that she would be receiving interest from her money that would help her financially. Glenn obtained a promissory note from APFC to Mary in the amount of $100,000 and gave it to her to sign. On December 12, 2007, Mary executed the note. The terms of the note provided a maturity date of December 12, 2011, monthly interest payments of $855.16, and collateral in the form of a security interest in the receivables from the college to APFC. When Mary went to the bank to obtain the check, the teller who assisted her remarked that the interest rate was extremely high and that she would not have made the loan. Mary did not seek any further information about the loan or otherwise.

Mary loaned money to the college by giving Glenn a $100,000 check to give to APFC. Shortly after receiving Mary's check, APFC transferred the $100,000 to the college. However, APFC made the monthly interest payments of $855.16 on Mary's loan. The money used to make such payments came from the college's monthly payments to APFC. Polhill never spoke to Mary about her loan, did not give her a note or any documents to sign, and did not have any interaction with her. Of the 13 monthly interest payments that Mary received, five were late. Because some of the payments were late, in late 2008 Mary complained to an unknown person at APFC.

By December 2008, it was agreed that the debt owed to Mary should be assumed directly by CPC, and thus, Mary's first $100,000 note was repaid with a second note in the same amount from the college. APFC acted as guarantor of the second note, and the liability was credited to the college on APFC's books. Glenn gave Mary a copy of the promissory note from CPC, signed by Edelbach. The terms of the second note provided that the $100,000 loan would mature on December 12, 2010, that the collateral to secure the note was in the form of a security interest in the receivables to the college, and that it was guaranteed and serviced by APFC. The second note was dated December 31, 2008. Edelbach never had any communications with Mary about the note prior to her signing it. At the time he signed the note, Edelbach believed the college's financial future was improving such that CPC could repay the loan. Edelbach had no intent to defraud Mary, nor did he have any knowledge of any such intent by Glenn. On December 12, 2010, the date the loan was due, CPC failed to pay it.

Glenn asked his brother, Stanley, to loan money to CPC, and he agreed to do so. CPC has repaid some of that loan; however, a balance remains.

Plaintiffs' expert testified that at the time Mary entered into the note with APFC, APFC had long-term liabilities in excess of $126 million; there were notes in excess of $7 million that had interest due; it had a gross profit of under $1 million; APFC had a negative equity of $52 million at the end of 2007, and $111 million at the end of 2008; and that its long-term liabilities at the end of 2008 were $154 million. The expert admitted that he was testifying about the "book value" of the company and had not considered the "market value." If he had considered "market value," his testimony may be different.

Following the close of plaintiffs' case, defendants sought nonsuit on causes of action 5 through 8, inclusive, as to Glenn and Edelbach, cause of action 9 as to all defendants, cause of action 10 as to Polhill, and cause of action 11 as to all defendants. The trial court granted the motion on the following grounds: As to Polhill, the trial court found no evidence that he ever spoke to Mary, made any representations regarding the company's ability to meet its obligations to anyone for the purpose of passing on such information to Mary, or received any part of the $100,000. Polhill's signature, as president of the company, on the promissory note, guarantee, or servicing agreement, is insufficient to constitute any representation or promise that the company would repay the loan. As to Edelbach, the trial court applied the same reasoning. As to Glenn, the trial court found that his representation that Mary's investment with APFC was safe is insufficient for any reasonable person to conclude that "there is no way" he or she is going to lose his or her money. The fact that Mary was receiving a higher rate of interest on her investment in the college meant that such investment was less safe. Glenn's representation that the second note would be better than the first was merely a statement of opinion. Also, the court found no evidence that Glenn's statement about Mary receiving monthly interest payments was false when he made it. Regarding the second note, Glenn's knowledge of the college's tax problem does not equate to knowledge of the college's inability to meet its other obligations. As to the claim of elder abuse, the trial court found no evidence that at the time Glenn solicited Mary's investment he knew or should have known she would be harmed. As to Mary's claim of fraud and elder abuse against CPC, the trial court found that the tax problem was insufficient to show that the officers and directors of CPC knew it would be unable to repay Mary's loan. As to the common counts against the individual defendants, the trial court found no evidence that any money went to them. While nonsuit was granted as requested, defendants admitted that CPC breached its obligations to pay the plaintiffs on the amounts loaned to CPC. Judgment was entered accordingly.

II. DISCUSSION

A. Plaintiffs Have Provided No Evidence Showing They Are Entitled to Judgment.

1. Standard of Review.

Code of Civil Procedure section 581c authorizes granting a motion for nonsuit after the plaintiff completes presenting his or her evidence in a jury trial. (*Alpert v. Villa*

Romano Homeowners Assn. (2000) 81 Cal.App.4th 1320, 1327 and fn. 4.) In ruling on the motion, the trial court must indulge in every legitimate inference that may be drawn in plaintiff's favor, disregarding any conflicting evidence and accepting the evidence most favorable to the plaintiff as true. A nonsuit is proper if the evidence viewed in this light would not be sufficient to support a jury verdict in plaintiff's favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).) Although the court may infer facts from the evidence, those inferences must be logical and reasonable and cannot be based on mere possibility, suspicion, imagination, speculation, supposition, surmise, conjecture or guess work. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581.)

In reviewing the trial court's judgment, we independently review the record and apply the same test. We must find that, after interpreting the evidence most favorable to the plaintiff and most strongly against the defendant, judgment for the defendant was required as a matter of law. (*Nally, supra*, 47 Cal.3d at p. 291.)

2. Mary's Fraud, Negligent Misrepresentation and Elder Abuse Causes of Action.

In addition to fraud and negligent misrepresentation, Mary alleges a claim for elder abuse. Elders may sue those who take advantage of them for "[f]inancial abuse." (Welf. & Inst. Code, § 15610.30.) "Financial abuse" of an "elder" occurs when a person (1) "[t]akes, secretes, appropriates, obtains, or retains," (2) the "real or personal property of an elder," (3) "for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a)(1).) It also occurs when a person assists in doing the above. (Welf. & Inst. Code, § 15610, subd. (a)(2).) The statute requires not only that the defendant obtain some money or property of the elder, but also that the defendant do so wrongfully. The wrongfulness element can be satisfied by fraud, constructive fraud, undue influence, embezzlement, or conversion. (See Balisok, Elder Abuse Litigation (The Rutter Group 2015) Financial Abuse, § 8.21 ["The range of possible schemes that might be addressed by remedies for financial abuse is too broad for comprehensive treatment. Each scheme, however, will be presumptively fraudulent or the product of actual fraud, undue influence and/or mistake."]; Cal. Elder Law Litigation: An Advocate's Guide (Cont.Ed.Bar 2016) § 6.23.) We will assume, without deciding, that the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, §§ 15600 et seq.) creates a new cause of action, rather than merely providing enhanced remedies for existing causes of action. (See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664-666; see also *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1524-1525 [Fourth Dist., Div. Two].)

Because Mary relies on the same allegations to support her fraud, negligent misrepresentation and elder abuse claims, we consider them together. If Mary is unable to state a claim of fraud and negligent misrepresentation, she also fails to state a claim of elder abuse. According to Mary's tort claims, defendants induced her to loan $100,000 to be used for the college in December 2007. Initially the loan was to APFC; however, in December 2008, the loan was transferred directly to CPC. Mary claims defendants told her that the loan was "a good investment and safe, and that it would be secured by accounts receivables and other assets." She asserts that Edelbach's and Polhill's signatures on the two separate promissory notes constitute representations of the financial stability of the entities receiving her money, as well as assurances that she would be paid back.

Challenging the nonsuit on her tort claims, Mary argues that because defendants were officers and/or directors of APFC and CPC, they knew or should have known the business entities were financially weak, such that any representation (including their signatures on the promissory notes) she would be paid back, "was made with reckless disregard for its truth, or it should have been known that it was false."[5] (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505 [directors of a homeowners association could be held individually liable *in tort* for personal involvement in decisions which created an unreasonable risk of harm to third parties].) The facts on which Mary relies as evidence of her tort claims were not sufficient to go to a jury. It is undisputed that neither Polhill nor Edelbach made any representation to Mary about APFC's or CPC's financial state or ability to repay her loan, because neither person ever spoke to or communicated directly with her. The only connection between Mary and these two men is their signatures on the promissory notes, which she argues constitute representations that "give rise to claims for fraud against the individuals." However, the language in the

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[5] She frames the matters at issue as follows: (1) Do signed representations of officers, directors, and shareholders of an entity made on behalf of the entity constitute representations? In other words, may officers, directors and/or shareholders be liable for an entity's torts? (2) Do Glenn's representations to Mary regarding APFC's and CPC's financial conditions and ability to repay a loan constitute statements of fact? (3) Was there evidence that, at the time defendants made certain representations about APFC and CPC, they knew or should have known that such representations were false? (4) Did Polhill and Edelbach assist in taking Mary's money for purposes of her claim of elder abuse? We frame our discussion differently, while addressing, explicitly or implicitly, each of the questions she raises.

notes constitutes promises to perform, not representations of fact. "Strictly speaking, a mere promise is not a representation, and the failure to make it good is a breach of contract . . . ." (*Lawrence v. Gayetty* (1889) 78 Cal. 126, 131.) Thus, the evidence fails to support a tort claim against Edelbach or Polhill.

Moreover, neither Edelbach nor Polhill can be held liable for their respective company's alleged promises without intent to perform. Directors and officers of a corporation are not personally liable for its torts merely because of their official positions, but they may become liable if they directly ordered, authorized, or participated in the tortious conduct. (*Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal.App.4th 852, 866.) Here, Mary presented no evidence that Edelbach or Polhill made any representations, or directed others to make misrepresentations, to her. Moreover, there is no evidence that either Edelbach or Polhill was aware of Glenn's representations to Mary, or that they knew or participated in any alleged fraudulent act. (*Mars v. Wedbush Morgan Securities, Inc.* (1991) 231 Cal.App.3d 1608, 1616 [an agent is not responsible for its principal's fraud unless the agent knows of or participates in the fraudulent act]; *Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1110-1111 [no personal liability where the evidence failed to show that the officer of a corporation controlled, knew or should have known of another's tortious or wrongful action].)

Unlike Edelbach and Polhill, Glenn spoke to Mary and allegedly convinced her to loan CPC $100,000. Thus, Mary asserts that Glenn's representations are actionable. "To be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts. '[P]redictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud.' [Citations.]" (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.) The only exceptions to this rule arise "(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion. [Citation.]" (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152.)

Here, Glenn's alleged representations that the investment was safe and that the second promissory note was better than the first were opinions. (*Brakke v.Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769.) While those opinions were offered by Mary's son, the existence of a familial relationship does not necessarily create a fiduciary relationship for purposes of an exception to the rule. (*Kudokas v. Balkus* (1972) 26 Cal.App.3d 744, 750.) There is no evidence that Glenn held himself out as being specially qualified or that he stated his opinion as an existing fact.

Regarding Glenn's alleged representation that Mary would receive monthly payments on the first promissory note, we, like the trial court, find this was untrue to the extent that five payments were untimely. However, as with Edelbach and Polhill, there was no evidence that Glenn knew, nor should he have known at the time Mary executed the first promissory note, that APFC would not be able to make timely monthly payments because there was no evidence regarding APFC's future inability to meet its financial obligations. Moreover, even if there was such evidence, Mary failed to show that Glenn had access to it. Rather, the evidence shows Glenn was simply relying on general information from Polhill.

Regarding CPC's financial ability, the evidence shows that Glen, as treasurer, would have knowledge of the college's financial condition; however, Mary failed to present sufficient evidence that anyone knew or should have known, at the time CPC executed the second promissory note with Mary, that it would be unable to repay the loan when it became due. Furthermore, there is no evidence that Glenn did not intend for her to be repaid.[6] The fact that CPC may have owed payroll taxes or had negative equity is insufficient when considering that CPC was in its first two years of operation. Most businesses struggle financially until they have established themselves. Those same businesses borrow money and offer a higher rate of interest because of the risky nature of the investment. There is no crystal ball that predicts which businesses will succeed and which ones will fail.

For the above reasons, we conclude defendants were entitled to nonsuit on Mary's tort claims.

3. Stanley's Common Counts.

Challenging nonsuit on his common counts, Stanley argues there is no evidence that his payments went to CPC rather than to Glenn and Edelbach. He further asserts that CPC was operating without the statutorily required number of directors when it accepted his payments thereby rendering CPC's acts ultra vires.

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[6] The same may be said of Edelbach and Polhill.

According to the evidence, Glenn asked Stanley about loaning money to the college and Stanley agreed to do so via a cash advance on his credit cards. The money went straight to the college, not to Glenn or Edelbach. Contrary to Stanley's claim, there is no evidence that his loan went to anyone other than CPC.

As for his claim that CPC was operating without the statutorily required number of directors such that CPC's acts were ultra vires, the issue was discussed during the trial, and briefing was requested. In response, defendants submitted a brief addressing the ultra vires issue. The evidence shows that a subsequent statutorily required number of directors of CPC ratified the actions of CPC. "In its true sense the phrase ultra vires describes action which is beyond the purpose or power of the corporation. [Citations.] Some courts have inflated the phrase to characterize acts which are within corporate purpose or power but performed in an unauthorized manner or without authority. [Citations.]" (*McDermott v. Bear Film Co.* (1963) 219 Cal.App.2d 607, 610.) Here, a lack of the required number of directors means that CPC's acceptance of Stanley's loan was performed in an unauthorized manner. However, the subsequent ratification of CPC's action makes Stanley's argument moot. (*Meyers v. El Tejon Oil & Refining Co.* (1946) 29 Cal.2d 184, 187 ["'Anything from which it may be clearly found . . . that the board as a board has agreed that the void act should be binding will suffice.'"]; *Hibernia Sav. & Loan Soc. v. Belcher* (1935) 4 Cal.2d 268, 275 [subsequent acquiescence of an absent director in the corporation constituted an implied ratification].)

Glenn and Edelbach were entitled to nonsuit on Stanley's common counts.

B. The Trial Court Properly Denied Plaintiffs' Request for Elevated Sanctions.

1. Procedural Background for Discovery Motions.

Plaintiffs filed multiple discovery motions against defendants in early 2013. To resolve the issues raised in those motions, on April 11, 2013, the parties filed their stipulation wherein they agreed that the discovery motions were granted, defendants would comply with the discovery requests, defendants and their counsel, jointly and severally, would pay sanctions in the amount of $1,380, and the trial court could enter an order based on the terms of the stipulation. When plaintiffs were not satisfied with defendants' responses, they filed more motions seeking terminating sanctions, issues sanctions or an order compelling further responses and production of documents regarding Polhill. On July 2, 2013, the trial court granted the motions, ordering defendants to provide further responses and produce documents, and sanctioning defendants and their counsel in the amounts of $4,670 and $5,570 to be paid to plaintiffs' counsel on or before August 2, 2013. The court stated that it would take up the issue of terminating sanctions at the hearing on August 1, 2013.

On July 9, 2013, the court indicated it would be appointing a discovery referee under Code of Civil Procedure section 639, subdivision (a)(5), "based upon the number of motions that have presently been held, the parties['] positions, and the tendency not to resolve these matters amongst themselves." When counsel was directed to choose a referee within three days, all counsel indicated that was agreeable. No counsel raised any objections to such appointment based on inability to pay. Rather, plaintiffs questioned whether the "discovery referee [would] be authorized to—in his discretion to shift the costs to non-prevailing party on the motions." The order appointing a discovery referee was filed on July 24, 2013. Pursuant to that order, the trial court noted the continued hearing for terminating sanctions set for August 1, 2013, would "be heard by the Court in this Department." On August 1, 2013, the trial court noted that Judge Leroy Simmons had been appointed as the discovery referee. Regarding the issue of terminating sanctions, the trial court denied plaintiffs' request.

On August 12, 2013, Mary filed her notice of lodging specific documents relating to her request for terminating sanctions against defendants. On September 16, 3013, Judge Simmons submitted his report and recommendation regarding plaintiffs' motions to compel and for monetary and terminating sanctions. Pursuant to the report, Judge Simmons opined that the trial court previously denied plaintiffs' request for terminating sanctions, but reserved ruling on the issue based upon the referee's recommendation. Judge Simmons concluded that it was "doubtful that the perceived discovery problems are so egregious as to warrant the ultimate sanction of termination." Thus, he recommended that the request for terminating sanctions be denied. He further recommended how he would apportion payment of his fees. On October 3, 2014, the trial court agreed that it had previously denied terminating sanctions "on the basis either there was partial compliance or there just wasn't adequate meet and confer . . . ." The court maintained its ruling while the monetary sanctions remained unpaid.

2. Standard of Review.

When reviewing discovery orders, "[t]he standard of review is whether or not there has been an abuse of discretion. Discovery sanctions are subject to reversal only for '"arbitrary, capricious, or whimsical action."' [Citation.]" (*Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601.)

3. Analysis.

Plaintiffs contend the trial court abused its discretion in denying their request for elevated (i.e., terminating) sanctions. They question whether the trial court ruled on the discovery motions prior to October 3, 2013. Our review of the record indicates that the trial court did rule on the applicable discovery motions on August 1, 2013, including the request for terminating sanctions. The trial court explicitly stated that it was "not going to grant sanctions." When asked if the court was referring to the discovery motion when it said "no sanctions," the court replied, "Yes. [¶] . . . [¶] I saw everything. I am denying sanctions." However, to the extent issues remained regarding defendants' failure to comply with plaintiffs' discovery requests, the court appointed a referee, Judge Simmons, to resolve those issues and make recommendations for the trial court. Upon receiving Judge Simmons's recommendations, the trial court chose to follow them. We have reviewed Judge Simmons's recommendations, along with the trial court's decision to adopt those recommendations, and conclude that the trial court did not abuse its discretion in denying the request for elevated sanctions.[7]

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[7] We note that plaintiffs have failed to point out any specific documents or discovery not produced that harmed their ability to present their case, and thus, support their claim that the trial court abused its discretion in ruling on their discovery motions. When a claim is reviewed for an abuse of discretion, the burden is on the defendant to demonstrate error by an adequate record. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) "As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.'

[footnote continued on next page]

C. The Trial Court Properly Allocated the Cost of the Discovery Referee.

Plaintiffs challenge the trial court's order allocating the cost of the discovery referee between the parties' counsel. They further fault the court for failing to determine the ability to pay as required by Code of Civil Procedure section 639, subdivision (d)(6).

"Under Code of Civil Procedure sections 639, subdivision (e), and . . . 645.1, a court has discretion to appoint a referee to hear and determine discovery motions and to apportion the payment of the referee's fees among the parties in any manner determined by the court to be 'fair and reasonable.'" (*McDonald v. Superior Court* (1994) 22 Cal.App.4th 364, 367, fn. omitted.) We agree that the trial court erred in ordering the parties' counsel to pay for the referee's fees.[8] (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 103 ["[Code of Civil Procedure] [s]ections 645.1 and 1023 permit the court to order 'the parties'—*not* counsel for the parties—to pay the referee's fees"].) However, regarding the court's failure to determine the parties' ability to pay, the record shows that, at the time the trial court announced its intent to appoint a discovery referee, no party objected on grounds of inability to pay. Rather, plaintiffs requested that the fees be borne by the nonprevailing party. Because there was not a specific nonprevailing

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[footnote continued from previous page]
[Citations.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) Factual assertions in an appellate brief that are not supported by references to the record may be disregarded. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.)

[8] There is nothing in the record that indicates the court was ordering counsel to pay the discovery referee's fees pursuant to Code of Civil Procedure sections 2023.010, 2023.020, or 2023.030 [monetary sanctions for misuse of discovery process].

party, Judge Simmons recommended an apportionment of his fees. Plaintiffs never objected to such recommendation. (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 557 ["The failure to file a written objection to the contents of the referee's report or to properly move to set aside the report results in the waiver of the right to object to the referee's findings."].) Thus, although the trial court failed to determine the parties' ability to pay the discovery referee's fee, we conclude that plaintiffs waived their right to complain on appeal because they failed to object at the trial level. In fact, plaintiffs got exactly what they asked for, i.e., Judge Simmons ordered the nonprevailing parties to pay his fees.

D. The Trial Court Properly Allowed Defendants to Amend Their Answer.

Plaintiffs contend the trial court abused its discretion in allowing defendants to amend their answer on the eve of trial over their objection.

"In the furtherance of justice, trial courts may allow amendments to pleadings and if necessary, postpone trial. [Citation.] Motions to amend are appropriately granted as late as the first day of trial [citation] or even during trial [citation] if the [opposing party] . . . will not be prejudiced. 'When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict "is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling."' [Citation.]" (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.) Moreover, the policy of liberal allowance of amendments applies with particular force to answers (*Gould v. Stafford* (1894) 101 Cal. 32, 34), "for a defendant denied leave to amend is permanently deprived of a defense." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159).

Here, prior to beginning voir dire, the issue was raised concerning the "apparent deficiency" in defendants' answers. According to plaintiffs, the answers admitted certain allegations. Defendants explained how the answers did deny each and every allegation. The trial court agreed with defendants and ruled that "either they are specifically denied, or insofar as it's not clear I think it's a reasonable interpretation and [plaintiffs' counsel] hasn't articulated any prejudice about that. In any event, there's been full discovery conducted in trial preparation on all of these issues." Regarding defendants' denial of the plaintiffs' common counts based on information and belief, the trial court declined to deem the allegations admitted because the "allegations are on information and belief rather than stated directly."

Based on these facts, we find no abuse of discretion. Plaintiffs have not argued (either in the trial court or on appeal) that they were prejudiced by the amendment because they did not have the opportunity to conduct discovery. We are unable to detect any indication the amendment ambushed plaintiffs in preparing for trial. In deciding to allow the amendment, the trial court appropriately considered the arguments before it and balanced the interests at stake. Absent any evidence of prejudice to plaintiffs, we conclude the decision was not an abuse of discretion.

E. The Trial Court Properly Excluded Evidence.

Plaintiffs contend the trial court erred in excluding relevant and material evidence, including the Security Exchange Commission's (SEC) action against Polhill, APFC's and CPC's financial conditions after January 2009, along with APFC's bankruptcy, tax liens filed against CPC, and the source of Mary's funds. Generally, we review a trial court's decision to grant or deny a motion in limine under the abuse of discretion standard of review. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519-520 [the trial court possesses broad discretion in deciding the admissibility of evidence].)

1. SEC Action Against Polhill.

Plaintiffs sought to admit the consent decree entered between the SEC and Polhill on the grounds it is relevant because it "makes accusations of a massive, $160,000,000 fraud perpetrated by Polhill." The trial court found the decree to be irrelevant and refused to admit it. We agree. (*Lipsky v. Commonwealth United Corp.* (2nd Cir. 1976) 551 F.2d 887, 893-894 [consent judgment is not the result of an actual adjudication of any of the issues and thus is inadmissible]; *Kramas v. Security Gas & Oil, Inc.* (9th Cir. 1982) 672 F.2d 766, 772.)

2. APFC's and CPC's Financial Conditions After January 2009, Along with APFC's Bankruptcy.

Plaintiffs sought to admit evidence of what happened to APFC and CPC after January 2009 in order to show what defendants knew, or should have known, about the reality of the situation "at that time, with significantly greater accuracy than a mere projection." Regarding APFC's bankruptcy, plaintiffs argued that such evidence "would have demonstrated that, eventually, the entire scheme collapsed, 'as all Ponzi schemes eventually do.'" The trial court opined that "any financial projections that were known at the time the loans were made or the loan was transferred . . . is highly relevant. . . . But the cut-off date is what they knew at the time . . . the date of the transfer of the loan as opposed to the initial loan." The court found APFC's bankruptcy was irrelevant unless the "individual defendants, you know, and the people who were making the decisions and so forth, knew at the time of the transaction that a bankruptcy filing was on the horizon." Thus, the trial court refused to admit the evidence. We find no abuse of discretion. The only evidence that was relevant was evidence of the current and projected financial status of the companies at the time plaintiffs loaned money to CPC. By seeking to introduce evidence of what happened to the companies two or three years later, plaintiffs seek to hold defendants accountable for seeing things only visible with the benefit of hindsight.

3. Tax Liens Filed Against CPC.

Plaintiffs contend the trial court abused its discretion in excluding evidence of tax liens filed against CPC after the second note as executed. They argue that the court's reason for finding the evidence irrelevant (i.e., Mary took no steps to foreclose on any security interest which she may have had) "ignores the fact that Mary could not foreclose until December 2010, at the earliest, as this was the maturity date of Mary's second note." We reject their argument. The tax liens are only relevant to the extent they existed at the time Mary entered into her notes, creating an impediment to foreclosing on any security interest she was given. The trial court correctly allowed plaintiffs to introduce evidence of the mounting tax debt and defendants' knowledge of such debt.

However, evidence that tax liens were later filed is irrelevant to parties' actions at the time plaintiffs loaned money to CPC. The trial court did not abuse its discretion in excluding such evidence.

4. The Source of Mary's Funds.

The trial court refused to allow plaintiffs to introduce evidence that the source of Mary's $100,000 loan was inheritance on the ground that "money is money, and the source of these investments funds, that's irrelevant." On appeal, plaintiffs contend that the source of Mary's funds is relevant to her claim for noneconomic damages based on her financial elder abuse cause of action. In light of our conclusion that nonsuit was properly granted in favor of defendants on Mary's financial elder abuse cause of action for the reasons discussed above, plaintiffs' challenges to the trial court's rulings on this issue is moot. (*People v. J.S.* (2014) 229 Cal.App.4th 163, 170 ["as a general matter, an issue is moot if 'any ruling by [the] court can have no practical impact or provide the parties effectual relief'"].) We therefore need not, and do not, discuss the issue.

F. The Trial Court Properly Excluded Evidence as to Whether Mary's First Note Was Perfected.

Plaintiffs sought to introduce evidence that Mary's first note with APFC was not perfected. The trial court found the evidence to be irrelevant "because there was a novation, and then the new note that was breached. There's no allegation that [the first note with APFC] was breached. APFC is not a party to this case." Plaintiffs contend the trial court erred in excluding this evidence. We disagree. The trial court correctly concluded that the evidence was irrelevant due to the novation. At the time Mary entered into the second note, any interest she had in the assets that secured her first note extinguished because the assets of the two notes were different. Nonetheless, defendants point out that plaintiffs questioned Polhill about APFC's UCC filing with regards to Mary's first note, the fact that Polhill did not have one filed for Mary, and the fact that he caused APFC to file a UCC financing statement with the state of California in connection with APFC's $850,000 loan to CPC.

III. DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

MILLER
J.